No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JASON DANIEL SIMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 854 F.3d 1037.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 2017. A petition for rehearing was denied on August 3, 2017 (App., *infra*, 8a). On October 20, 2017, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including December 1, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 9a-26a.

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Arkansas, respondent was convicted of unlawful possession of a firearm after a previous felony conviction, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 210 months of imprisonment, to be followed by three years of supervised release. Judgment 1-3. The court of appeals vacated the sentence and remanded for resentencing. App., *infra*, 7a.

1. Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of unlawful possession of a firearm after a previous felony conviction is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense." The ACCA defines a "violent felony" to include, *inter alia*, any crime punishable by more than one year that "is burglary, arson, or extortion, [or] involves use of explosives." 18 U.S.C. 924(e)(2)(B)(ii). Although the ACCA does not define "burglary," this Court in *Taylor* v. *United States*, 495 U.S. 575 (1990), construed the term to include "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599.

Taylor instructed courts to employ a "categorical approach" to determine whether a prior conviction meets that definition. 495 U.S. at 600. Under that approach, courts examine "the statutory definition[]" of the previous crime in order to determine whether the jury's finding of guilt, or the defendant's plea, necessarily reflects conduct that constitutes the "generic" form of burglary

referenced in the ACCA. *Ibid.* If the statute of conviction consists of elements that are the same as, or narrower than, generic burglary, the prior offense categorically qualifies as a predicate conviction under the ACCA. But if the statute of conviction is broader than the ACCA definition, the defendant's prior conviction does not qualify as ACCA burglary unless (1) the statute is "divisible" into multiple crimes with different elements, and (2) the government can show (using a limited set of record documents) that the jury necessarily found, or the defendant necessarily admitted, the elements of generic burglary. See *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016); *Descamps* v. *United States*, 133 S. Ct. 2276, 2284 (2013); *Shepard* v. *United States*, 544 U.S. 13, 26 (2005).

2. In January 2014, respondent broke into a home in St. Francis County, Arkansas, and stole a rifle. Pet. for Reh'g 3. A federal grand jury indicted respondent on one count of unlawfully possessing a firearm after a prior felony conviction, in violation of 18 U.S.C. 922(g)(1), and respondent pleaded guilty to that crime. App., *infra*, 1a.

At sentencing, the district court determined that, in addition to two prior convictions for "serious drug offenses," respondent had two prior convictions for "violent felonies" under the ACCA, App., *infra*, 2a—specifically, two convictions for residential burglary under Arkansas Code Annotated § 5-39-201(a)(1). That statute criminalizes burglary of a "residential occupiable structure," *ibid.*, defined as "a vehicle, building or other structure: (i) In which any person lives; or (ii) That is customarily used for overnight accommodation of a person whether or not a person is actually present,"

id. § 5-39-101(4)(A) (2013).* The court applied the ACCA and sentenced respondent to 210 months of imprisonment. App., *infra*, 3a.

3. The court of appeals vacated respondent's sentence and remanded for resentencing. App., *infra*, 1a-7a. As in the district court, respondent did not contest that his two prior drug offenses constituted ACCA predicates, but he argued that his convictions for residential burglary under Arkansas law did not qualify as "violent felon[ies]" for purposes of the ACCA. *Id.* at 3a-4a. The court of appeals agreed, concluding that "Arkansas residential burglary categorically sweeps more broadly than generic burglary" because it covers vehicles used or adapted for overnight accommodation. *Id.* at 6a. In the court's view, no burglary statute covering vehicles—even if limited to vehicles used as homes—can qualify as "burglary" under the ACCA. *Ibid.*

The court of appeals acknowledged that the government's position—that the Arkansas statute qualifies as generic burglary because it is limited to vehicles "'[i]n which any person lives'" or "'[t]hat [are] customarily used for overnight accommodation'"—is "not an

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* The court of appeals cited the 2013 versions of Arkansas Code Annotated §§ 5-39-101 and 5-39-201. See App., *infra*, 3a. The versions of those provisions that were in place at the time of respondent's burglary offenses differed slightly. In particular, Section 5-39-101 defined a "residential occupiable structure" as "a vehicle, building, or other structure (A) Where any person lives; or (B) Which is customarily used for overnight accommodation of persons whether or not a person is actually present." Ark. Code Ann. § 5-39-101(1) (Michie 1997). Both the current and prior versions of the statutes are included in the appendix to this petition. App., *infra*, 22a-26a. Because the changes are immaterial to the question presented, this petition cites the current versions of the statutes addressed by the court of appeals.

unreasonable one" and that "this issue has divided circuit courts." App., *infra*, 5a (quoting Ark. Code Ann. § 5-39-101(4)(A) (2013)) (brackets in original). But the court deemed itself bound by its decision in *United States* v. *Lamb*, 847 F.3d 928 (8th Cir. 2017), petition for cert. pending, No. 17-5152 (filed July 10, 2017), which had stated that a Wisconsin statute "encompasse[d] a broader range of conduct than generic burglary as defined in *Taylor*" because it covered "burglary of railroad cars, ships, trucks, and motor homes." *Id.* at 931. The court concluded that *Lamb*'s reference to motor homes "foreclose[d] the Government's argument" that Arkansas residential burglary—which is narrower than the Wisconsin statute in many respects but likewise covers motor homes—fits within the generic *Taylor* definition. App., *infra*, 6a.

4. The court of appeals denied the government's petition for rehearing en banc. Judge Loken, who authored *Lamb*, and Judge Wollman, who joined that opinion, would have granted the petition for rehearing. App., *infra*, 8a.

REASONS FOR GRANTING THE PETITION

For reasons explained in the government's petition for a writ of certiorari in *United States* v. *Stitt*, which is being filed in conjunction with this petition, the court of appeals' holding—that burglary of a nonpermanent or mobile structure that is used or adapted for overnight accommodation can never qualify as generic burglary—is wrong and warrants this Court's review. See Pet. at 9-22, *Stitt*, *supra*. In contrast to this Court, which has construed burglary under the ACCA to reflect the "sense in which the term is now used in the criminal codes of most States," *Taylor* v. *United States*, 495 U.S. 575, 598 (1990), the court of appeals has construed it in

a manner that would include very few States' burglary laws. See Pet. at 11, 13-14, 14-15, *Stitt*, *supra*. The court of appeals' interpretation of the ACCA also gives short shrift to Congress's view that the invasion of a home is a violent crime, see *Taylor*, 495 U.S. at 581, a view that applies equally (if not more) to the invasion of a trailer home as to the invasion of a mansion. See Pet. at 12-13, 14, *Stitt*, *supra*. And, as the government's petition in *Stitt* describes, the court of appeals' decision implicates an acknowledged conflict in the courts of appeals about the scope of this very common ACCA predicate. *Id.* at 18-19.

Stitt provides the best available vehicle for resolving that conflict. In *Stitt*, the en banc Sixth Circuit held, by a vote of 9-6, that a prior conviction under Tennessee's aggravated burglary statute, Tenn. Code Ann. § 39-14-403 (1997), does not constitute "generic burglary" because the statute criminalizes burglary of nonpermanent and mobile structures adapted for habitation. See *United States* v. *Stitt*, 860 F.3d 854 (2017). The question presented received the fullest consideration in *Stitt*: in addition to the majority opinion, five judges joined one or both of two separate concurrences, and Judge Sutton authored a thorough dissent joined by five other judges. See *ibid.* The Court should grant the petition for a writ of certiorari in *Stitt*, hold the petition in this case pending its disposition of *Stitt*, and then dispose of this petition as appropriate. If, however, the Court wishes to review the issue in the context of multiple state statutes, it could grant the petitions in both this case and *Stitt* and consolidate them for review.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in *United States* v. *Stitt* (filed Nov. 21, 2017), and then be disposed of as appropriate.

Respectfully submitted.

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NOVEMBER 2017

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16-1233

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JASON DANIEL SIMS, DEFENDANT-APPELLANT

Appeal from United States District Court
for the Eastern District of Arkansas—Little Rock

Submitted: Mar. 10, 2017
Filed: Apr. 27, 2017

Before: RILEY, Chief Judge,[1] GRUENDER, Circuit Judge, and SCHREIER,[2] District Judge.

GRUENDER, Circuit Judge.

Jason Daniel Sims pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He received an enhanced sentence pursuant to the Armed Career Criminal Act ("ACCA"), which applies to those felons guilty of possessing a firearm who also have at least three prior convictions

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[1] The Honorable William Jay Riley stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on March 10, 2017. He has been succeeded by the Honorable Lavenski R. Smith.

[2] The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota, sitting by designation.

for a violent felony or serious drug offense. *See* 18 U.S.C. § 924(e). On appeal, Sims contends that the district court erred in finding that his two prior Arkansas residential burglary convictions qualify as violent felonies because the Arkansas residential burglary offense is categorically broader than generic burglary. We agree and therefore vacate Sims's sentence and remand for resentencing.

The ACCA imposes a fifteen-year mandatory minimum sentence for anyone convicted of unlawfully possessing a firearm who has three or more prior convictions for serious drug offenses or violent felonies. 18 U.S.C. § 924(e)(1). "Burglary" is one of the offenses specifically enumerated as a violent felony under the ACCA. *See id.* § 924(e)(2)(B)(ii). In the ACCA context, the Supreme Court has defined burglary in its "generic" usage as "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *See Taylor v. United States*, 495 U.S. 575, 598-99 (1990).

Sims's Pre-Sentence Investigation Report (PSR) indicated that he had several prior felony offenses, including two convictions for serious drug offenses and two Arkansas convictions for residential burglary. The PSR stated that all four convictions qualified as ACCA predicate offenses and thus determined that Sims was subject to a minimum sentence of fifteen years as well as an advisory sentencing guideline enhancement based on his status as an armed career criminal. *See* U.S.S.G. § 4B1.4. Sims conceded that his two convictions for serious drug offenses constituted ACCA predicate offenses but argued that his Arkansas residential burglary convictions did not. He asserted

that the Arkansas residential burglary statute was over-inclusive and criminalized conduct that fell outside the generic definition of burglary. *See Taylor*, 495 U.S. at 599.

The district court disagreed with Sims and found his Arkansas residential burglary convictions were ACCA predicate offenses. As a result, Sims's advisory sentencing guidelines range was 188 to 235 months' imprisonment, and the district court imposed a 210-month sentence. On appeal, Sims renews his argument that Arkansas residential burglary is broader than generic burglary and that his convictions do not qualify as ACCA predicate offenses.

Under Arkansas law, "[a] person commits residential burglary if he or she enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing in the residential occupiable structure any offense punishable by imprisonment." Ark. Code Ann. § 5-39-201(a)(1). A "'[r]esidential occupiable structure' means a vehicle, building, or other structure: (i) [i]n which any person lives; or (ii) [t]hat is customarily used for overnight accommodation of a person whether or not a person is actually present." *Id.* § 5-39-101(4)(A). The Government concedes that the Arkansas residential burglary statute's listed items are separate means of satisfying a single locational element. *See Mathis v. United States*, 136 S. Ct. 2243, 2248-49 (2016) ("'Elements' are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction. . . . [M]eans . . . spell[] out various factual ways of committing some component of the offense. . . ." (citations and quotations omitted)). Thus, "we apply

the 'categorical approach,' under which we 'look only to the fact of conviction and the statutory definition of the prior offense.'" *United States v. Tucker*, 740 F.3d 1177, 1179 (8th Cir. 2014) (en banc) (quoting *Taylor*, 495 U.S. at 602). In short, Sims's Arkansas residential burglary convictions will qualify as generic burglaries —and thus serve as ACCA predicates—"only if the statute's elements are the same as, or narrower than, those of the generic offense." *See Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). We review the question of whether a prior conviction qualifies as an ACCA predicate *de novo*. *United States v. Thornton*, 766 F.3d 875, 878 (8th Cir. 2014).

Sims's central contention is that generic burglary's "building or structure" element does not encompass vehicles, and thus, the Arkansas residential burglary statute sweeps more broadly than generic burglary. The Supreme Court has clearly stated that "[t]he [ACCA] makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), *not in a boat or motor vehicle*." *Shepard v. United States*, 544 U.S. 13, 15-16 (2005) (emphasis added). In *Mathis v. United States*, the Court considered an Iowa burglary statute that all parties agreed criminalized more conduct than generic burglary. 136 S. Ct. at 2250. The Iowa statute made it a crime to burgle "any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value." *See* Iowa Code Ann. § 702.12; *Mathis*, 136 S. Ct. at 2250. The Supreme Court agreed that the Iowa burglary

statute was over-inclusive for the simple reason that the burglary statute "reache[d] . . . *land, water, or air vehicle[s].*" *Mathis*, 136 S. Ct. at 2250 (emphasis in original). Thus, the Court determined that convictions under the Iowa burglary statute could not serve as ACCA predicate offenses. *Id.* at 2257.

The Government responds that while the burglary of vehicles does not constitute generic burglary, the Arkansas residential burglary statute applies only to vehicles "[i]n which any person lives" or "[t]hat [are] customarily used for overnight accommodation," *see* Ark. Code Ann. § 5-39-101(4)(A), and therefore, Arkansas residential burglary criminalizes conduct that is "the same as, or narrower than . . . the generic offense," *see Descamps*, 133 S. Ct. at 2281. The Government's argument is not an unreasonable one as this issue has divided circuit courts. *Compare United States v. Spring*, 80 F.3d 1450, 1461-62 (10th Cir. 1996) (holding burglary of vehicles "adapted for the overnight accommodation of persons" constitutes generic burglary) (cited approvingly in *United States v. Patterson*, 561 F.3d 1170, 1173 (10th Cir. 2009), *with United States v. White*, 836 F.3d 437, 444-46 (4th Cir. 2016) (concluding a statute criminalizing burglary of "vehicle[s] primarily designed for human habitation and occupancy" sweeps more broadly than generic burglary), *and United States v. Grisel*, 488 F.3d 844, 850-51 (9th Cir. 2007) (en banc) (ruling that burglary of "any booth, vehicle, boat, aircraft, or other structure adapted for overnight accommodation of persons or for carrying on business therein" falls outside generic burglary). We are not, however, writing on a blank slate, as our decision in *United States v. Lamb*,

847 F.3d 928 (8th Cir. 2017), forecloses the Government's argument.

In *Lamb*, we analyzed a Wisconsin statute that criminalized, among other things, the burglary of "[a] motor home or other motorized type of home or a trailer home, whether or not any person is living in such home." *Lamb*, 847 F.3d at 931. We concluded "[w]ithout question, [the statute], viewed as a whole, encompasses a broader range of conduct than generic burglary as defined in *Taylor*, such as burglary of . . . motor homes." *Id.* Wisconsin's statute criminalizing the burglary of a "motor home" is equivalent to Arkansas's residential burglary statute, which criminalizes the burglary of vehicles where people live or that are customarily used for overnight accommodations. *See White*, 836 F.3d at 445-46; *see also Grisel*, 488 F.3d at 851 n.5. And just as it was inconsequential that Wisconsin's statute limited burglary to motor homes, it is inconsequential that Arkansas's statute confines residential burglary to vehicles "[i]n which any person lives" or "[t]hat [are] customarily used for overnight accommodation." Ark. Code Ann. § 5-39-101(4)(A); *see also United States v. Forrest*, 611 F.3d 908, 913 (8th Cir. 2010) (finding a Colorado burglary statute was categorically broader than generic burglary because it covered vehicles adapted for overnight accommodations). We therefore conclude that Arkansas residential burglary categorically sweeps more broadly than generic burglary.

Accordingly, Sims's Arkansas residential burglary convictions do not qualify as ACCA predicate offenses. We thus vacate Sims's sentence and remand for resentencing.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16-1233

UNITED STATES OF AMERICA, APPELLEE

v.

JASON DANIEL SIMS, APPELLANT

Appeal from the U.S. District Court
for the Eastern District of Arkansas—Little Rock
(4:14-cr-00071-JM-1)

Aug. 3, 2017

ORDER

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied.

Judge Wollman and Judge Loken would grant the petition for rehearing *en banc*.

Aug. 03, 2017

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

1. 18 U.S.C. 924 provides:

Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (*o*) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the pro-

visions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including

any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, dur-

ing and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the pres-

ence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or

any possession thereof any firearm or ammunition in violation of section 922(*l*), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described

in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(*l*), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which—

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled

Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that—

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(*o*) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) PENALTIES RELATING TO SECURE GUN STORAGE OR SAFETY DEVICE.—

(1) IN GENERAL.—

(A) SUSPENSION OR REVOCATION OF LICENSE; CIVIL PENALTIES.—With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing—

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) REVIEW.—An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

(2) ADMINISTRATIVE REMEDIES.—The suspension or revocation of a license or the imposition of a

civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

2. Ark. Code Ann. § 5-39-101 (Michie 1997) provides:

Definitions.

As used in this chapter, unless the context otherwise requires:

(1) "Residential occupiable structure" means a vehicle, building, or other structure:

(A) Where any person lives; or

(B) Which is customarily used for overnight accommodation of persons whether or not a person is actually present. Each unit of a residential occupiable structure divided into separately occupied units is itself a residential occupiable structure.

(2) "Commercial occupiable structure" means a vehicle, building, or other structure:

(A) Where any person carries on a business or other calling; or

(B) Where people assemble for purposes of business, government, education, religion, entertainment, or public transportation.

(3) "Premises" means occupiable structures and any real property.

(4) "Enter or remain unlawfully" means to enter or remain in or upon premises when not licensed or privileged to do so. A person who enters or remains in or upon premises that are at the time open to the public

does so with license and privilege, regardless of his purpose, unless he defies a lawful order not to enter or remain personally communicated to him by the owner of the premises or some other person authorized by the owner. A license or privilege to enter or remain in or upon premises only part of which are open to the public is not a license or privilege to enter or remain in a part of the premises not open to the public. A person who enters or remains upon unimproved and apparently unused land not fenced or otherwise enclosed in a manner designed to exclude intruders does so with license and privilege unless notice not to enter or remain is personally communicated to him by the owner or some person authorized by the owner, or unless notice is given by posting in a conspicuous manner.

(5) "Vehicle" means any craft or device designed for the transportation of people or property across land or water or through the air.

3. Ark. Code Ann. § 5-39-101 (2013) provides:

Definitions.

As used in this chapter:

(1) "Commercial occupiable structure" means a vehicle, building, or other structure in which:

(A) Any person carries on a business or other calling; or

(B) People assemble for a purpose of business, government, education, religion, entertainment, or public transportation;

(2)(A) "Enter or remain unlawfully" means to enter or remain in or upon premises when not licensed or privileged to enter or remain in or upon the premises.

(B)(i) A person who enters or remains in or upon premises that are at the time open to the public does so with license and privilege, regardless of his or her purpose, unless he or she defies a lawful order not to enter or remain on the premises personally communicated to the person by the owner of the premises or another person authorized by the owner.

(ii) A license or privilege to enter or remain in or upon premises only part of which are open to the public is not a license or privilege to enter or remain in a part of the premises not open to the public.

(C) A person who enters or remains upon unimproved and apparently unused land not fenced or otherwise enclosed in a manner designed to exclude an intruder does so with license and privilege unless:

(i) Notice not to enter or remain is personally communicated to the person by the owner or a person authorized by the owner; or

(ii) Notice is given by posting in a conspicuous manner;

(3) "Premises" means an occupiable structure and any real property;

(4)(A) "Residential occupiable structure" means a vehicle, building, or other structure:

(i) In which any person lives; or

(ii) That is customarily used for overnight accommodation of a person whether or not a person is actually present.

(B) "Residential occupiable structure" includes each unit of a residential occupiable structure divided into a separately occupied unit; and

(5) "Vehicle" means any craft or device designed for the transportation of a person or property across land or water or through the air.

4. Ark. Code Ann. § 5-39-201 (Michie 1997) provides:

Residential burglary—Commercial burglary.

(a)(1) A person commits residential burglary if he enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment.

(2) Residential burglary is a Class B felony.

(b)(1) A person commits commercial burglary if he enters or remains unlawfully in a commercial occupiable structure of another with the purpose of committing therein any offense punishable by imprisonment.

(2) Commercial burglary is a Class C felony.

5. Ark. Code Ann. § 5-39-201 (2013) provides:

Residential burglary—Commercial burglary.

(a)(1) A person commits residential burglary if he or she enters or remains unlawfully in a residential occupiable structure of another person with the purpose

of committing in the residential occupiable structure any offense punishable by imprisonment.

(2) Residential burglary is a Class B felony.

(b)(1) A person commits commercial burglary if he or she enters or remains unlawfully in a commercial occupiable structure of another person with the purpose of committing in the commercial occupiable structure any offense punishable by imprisonment.

(2) Commercial burglary is a Class C felony.